IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Mohd. Hussain & others vs. Qayum Ali & others.

S.B.CIVIL SECOND APPEAL NO.217/2000 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 1.5.2000 PASSED BY SHRI T.H. SHAMMA, ADDITIONAL DISTRICT JUDGE NO.3, UDAIPUR IN APPEAL NO.142/1996 (90/1990).

DATE OF JUDGMENT ::: 9.11.2005

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. Rajesh Choudhary for Mr. Suresh Srimali, for appellants.

Mrs. Pratistha Dave)
Mr. JK Bhaiya) for the respondents.

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BY THE COURT:

Heard learned counsel for the parties.

The appellants are aggrieved against the judgment and decree of the appellate court dated 1.5.2000 by which the first appellate court modified the judgment and decree passed by the trial court dated 13.9.1990 but maintained the decree for grant of permanent injunction.

Brief facts of the case are that the plaintiffs filed a suit for permanent injunction against the defendants alleging that certain properties described in the plaint are joint properties but the defendants want to encroach upon the joint property by excluding the plaintiffs. The plaintiffs further alleged that during the pendency of the suit, after grant of temporary injunction in their favour, the defendants raised construction in the common chowk.

The defendants contested the suit.

The trial court framed the issue whether the four chowks described in paras no.2 and 3 of the plaint are joint property of the parties. Due to subsequent event, on the basis of allegation of the plaintiff, additional issue was framed whether the defendant no.1 encroached upon part of the property described in paras 3(a) and (b). On the basis of plea taken by the defendants, the issue of adverse possession of defendants was also framed. The trial court after holding that the property in question, chowks are joint property and the defendants raised construction over part of the joint property during pendency of the suit, that too after grant of injunction by the trial court, therefore, the trial court vide judgment and decree dated 13.9.1990 passed the decree for removal of construction raised on chowks no.1 and 2. The trial court also ordered that the defendants shall not raise any construction on any part of the joint property.

The defendant Qayum Ali preferred appeal against the judgment and decree of trial court dated 13.9.1990. The first appellate court, after considering the facts of the

case, observed that since the plaintiffs pleaded about their right over the chowks no.1 and 2 and disclosed all the facts for chowks no.1 and 2 and has prayed for relief of chowks no.1 and 2, therefore, the trial court committed illegality in deciding the issue about chowks no.3 and 4. The first appellate court observed that the issue relating to chowks no.3 and 4 was not relevant at all. The first appellate court also held that the plaintiffs failed to prove that the defendant no.4 raised construction on joint property after grant of injunction by the trial court or during the pendency of the suit. The first appellate court, therefore, partly allowed the appeal vide judgment and decree dated 1.5.2000 and maintained the decree for injunction but set aside the decree for removal of alleged construction.

Aggrieved against the judgment and decree of the first appellate court, the plaintiffs/appellants have preferred this second appeal.

According to learned counsel for the appellants, the first appellate court committed serious error of law in holding that the issue in relation to chowks no.3 and 4 was irrelevant. According to learned counsel for the appellant, when the trial court framed the issue without any objection of the parties and the parties led their evidence and a decision was given by the trial court and the parties were given full opportunity to contest the issue, then the appellate court had no jurisdiction to reverse the finding of the trial court on the ground that the issue was

irrelevant. Learned counsel for the appellants relied upon a judgment of the Hon'ble Apex Court in the case of Indian Drugs & Pharm and others vs. Punjab Drugs Manufacturers Association and others reported in 1999 DNJ (SC) 219. Learned counsel for the appellants also relied upon the earlier judgment of Hon'ble Supreme Court in the case of Nagubai Ammal and others. vs. B. Shama Rao and others reported in AIR 1956 SC 593 wherein also, the Hon'ble Supreme Court held that even though no specific plea was raised in the pleadings and no specific issue was framed but when both the parties got full knowledge and opportunity to lead evidence and they led evidence, then the finding cannot be reversed.

According to learned counsel for the appellants, the first appellate court also committed serious error of law in rejecting the appellants' application under Order 41 Rule 27 CPC and the first appellate court erred in holding that the defendants had not constructed over the joint chowk during the pendency of suit and particularly after the passing of injunction order by the trial court.

I have considered the submissions of learned counsel for the parties and perused the facts of the case and record also.

So far as the relief about chowks no.3 and 4 is concerned, that relief was not sought by the plaintiffs in the plaint. No cause of action has been shown by the plaintiffs for seeking any relief for chowks no.3 and 4 in the plaint. The plaintiffs sought relief in relation to

chowks no.1 and 2 only which is clear from the pleadings. The plaintiffs also sought relief of removal of structure which according to the plaintiffs was raised by the defendant no.4 during pendency of suit and after grant of injunction, therefore, even subsequent event was also in relation to chowks no.1 and 2. The trial court also granted relief in relation to chowks no.1 and 2 only. Therefore, it is clear from even the judgment and decree of the trial court itself that no relief of mandatory injunction has been granted by the trial court for any of structure over the chowks no.3 and 4. The trial court granted decree of injunction with respect to all the joint properties. The appellate court upheld the decree for injunction, therefore, in the facts of this case, the appellants cannot have any grievance about the judgment and decree of the trial court so far as relief of injunction is concerned.

It is true and now it is settled by the judgments of the Apex Court that in cases where both the parties were fully aware and went for trial on an issue knowingly and led evidence, then mere non-framing of issue may not be fatal but in the facts of the case, that proposition cannot be applied. So far as relief of removal of structure which is alleged to be constructed during pendency of the suit is concerned, the first appellate court considered each and every material fact about the allegations and counter allegations and evidence produced by the parties and recorded finding of fact that the plaintiffs failed to prove that any construction was raised over joint chowk by the defendants during the pendency of suit and after

passing of the injunction order by the courts below. This finding of fact is based on appreciation of evidence and cannot be interfered in second appeal and there appears to be no reason to interfere in view of the reasons given by the first appellate court while deciding the issue.

So far as the application filed by the appellants under Order 41 Rule 27 CPC is concerned, that was rejected by the first appellate court vide order dated 27.10.1993. The first appellate court observed that the documents in question were in possession of the applicants/respondents before the first appellate court. The documents were filed after inordinate delay in a suit which was filed in the year 1976 and the applicants failed to disclose any just and sufficient cause for not filing the documents in time. I do not find that the first appellate court committed any error of law or any error of fact in rejecting the application under Order 41 Rule 27 CPC.

No substantial question of law is involved in this appeal. Hence, this second appeal is dismissed with no orders as to costs.

(PRAKASH TATIA), J.

S.Phophaliya